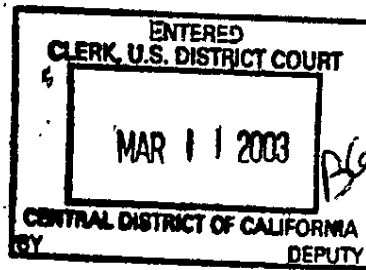
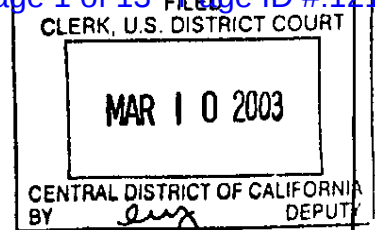


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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

REVOLUTION EYEWEAR, INC.,  
 Plaintiff,  
 v.  
 ASPEX EYEWEAR INC., et al.,  
 Defendants.

NO. CV 02-1087 LGB (CWx)

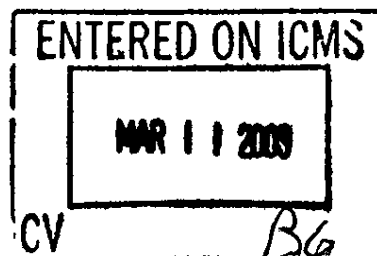
ORDER GRANTING DEFENDANT  
 REAL EYES OPTICAL, LLC'S  
 MOTION TO AMEND ITS ANSWER

I. INTRODUCTION

Plaintiff Revolution Eyewear, Inc. ("Plaintiff") has filed a claim for patent infringement against Defendant Real Eyes Optical, LLC ("Defendant"). The Court granted Defendant leave to file a motion to amend its answer by its minute order of January 13, 2003. Defendant brings this motion to amend its answer, pursuant to Federal Rules of Civil Procedure 15(a) and 16(b).

II. FACTUAL AND PROCEDURAL BACKGROUND

The Court held a scheduling conference in this case on October 7, 2003. The Court set the deadline to amend pleadings or to add



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1 parties as December 1, 2002.<sup>1</sup>

2 Defendant first filed a Motion for Leave to File an Amended  
3 Answer on December 2, 2002. Minute Order (1/13/03) at 2. However,  
4 Defendant failed to file a memorandum of points and authorities to  
5 support this motion, and subsequently withdrew the motion on  
6 December 12, 2002. Id. On December 23, 2002, Defendant filed a  
7 Motion for Leave to File a Motion to Amend Its Answer. Id. The  
8 Court granted this motion on January 13, 2003, pursuant to Federal  
9 Rule of Civil Procedure 6. Id.

10 Defendant files the instant Motion to Amend Its Answer under  
11 Federal Rule of Civil Procedure 15, alleging that it did not have  
12 sufficient information to add parties and counterclaims in the  
13 initial answer without violating Federal Rule of Civil Procedure  
14 11. Defendant's Motion to Amend its Answer ("Mot. to Amend") at 3.  
15 Defendant asserts that the reason for the delay in filing a Motion  
16 to Amend was miscommunication between two different offices of  
17 counsel for Defendant. The Court accepted this error as excusable  
18 neglect. Minute Order (1/13/03) at 3.

19 Defendant now claims to have obtained information from third  
20 party sources to allege specific counterclaims. Mot. to Amend at 3.  
21 To support this, Defendant lodged an Amended Answer and  
22 Counterclaims. Defendant contends that it should be allowed to file  
23 an amended answer because the law favors the liberal granting of  
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25  
26 <sup>1</sup>Because December 1, 2002 was a Sunday, the deadline to  
27 amend pleadings was actually December 2, 2002.

1 amendments in the interest of allowing parties to litigate all  
2 related claims at the same time. Id. Further, Defendant asserts  
3 that its efforts to correct its error constituted diligence under  
4 the "good cause" requirements of Federal Rule of Civil Procedure  
5 16. Id. at 7-9.

6 Defendant filed the instant motion on February 3, 2003.  
7 Plaintiff filed an Opposition on February 10, 2003. Defendant filed  
8 a Reply on February 24, 2003.

9 **III. LEGAL STANDARD FOR MOTION TO AMEND**

10 Federal Rule of Civil Procedure 15 governs amendments to  
11 pleadings. In relevant part, Rule 15 provides that "a party may  
12 amend the party's pleading only by leave of the court or by written  
13 consent of the adverse party; and leave shall be freely given when  
14 justice so requires." Fed. R. Civ. P. 15(a). When deciding whether  
15 or not to grant leave to amend, the court should consider several  
16 factors, including undue delay, bad faith, futility of amendment,  
17 and prejudice to the opposing party. Foman v. Davis, 371 U.S. 178,  
18 182 (1962). However, the Ninth Circuit has held that in determining  
19 whether or not leave to amend is appropriate, the "crucial factor  
20 is the resulting prejudice to the opposing party." Howey v. United  
21 States, 481 F.2d 1187, 1190 (9th Cir. 1973).

22 In the instant case, Defendant's motion to amend would result  
23 in a change to the deadline for making amendments to pleadings in  
24 the Scheduling Order since that date has already passed. Federal  
25 Rule of Civil Procedure 16 governs scheduling management of cases.  
26 Fed. R. Civ. P. 16(b). The Court in the instant case filed a  
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1 pretrial Scheduling Order, pursuant to Rule 16(b), on November 14,  
2 2002. According to the rule, "[a] schedule shall not be modified  
3 except upon a showing of good cause and by leave of the district  
4 judge". Johnson v. Mammoth Recreations Inc., 975 F.2d 604, 607-08  
5 (9th Cir. 1992); see also Landis v. North American Co., 299 U.S.  
6 248, 254 (1936). The existence or degree of prejudice to the party  
7 opposing the modification might provide a basis for denying the  
8 motion, but "the focus of the inquiry is upon the moving party's  
9 reasons for seeking modification." Johnson, 975 F.2d at 609.

10 The standard by which the court will determine whether or not  
11 there is good cause to allow the resulting modification "primarily  
12 considers the diligence of the party seeking the amendment."  
13 Jackson v. Laureate, Inc., 18 F.R.D. 605, 607 (E.D. Cal. 1999). The  
14 Court should consider the following in assessing the movant's  
15 diligence: (1) whether the movant was diligent in assisting the  
16 Court in creating a workable scheduling order; (2) whether  
17 noncompliance with the scheduling order occurred notwithstanding  
18 diligent efforts to comply, because of the development of matters  
19 that could not have been reasonably foreseen at the time of the  
20 scheduling conference; and (3) whether the movant was diligent in  
21 seeking amendment to the scheduling order, once it became apparent  
22 that the moving party could not comply with the order. Id. at 608.

23 It is the established rule of this Circuit that once a  
24 district court has filed a pretrial scheduling order pursuant to  
25 Federal Rule of Civil Procedure 16, which establishes a timetable  
26 for amending the pleadings, the standards of Rule 16 control.  
27

1 Johnson, 975 F.2d at 607-08. Therefore, Defendant's motion must  
2 first be analyzed under the standards of Rule 16, in order to  
3 determine whether or not modification of the scheduling order is  
4 warranted. Only if the Court concludes that modification of the  
5 scheduling order is appropriate should the Court apply Rule 15 to  
6 determine whether or not leave to amend is appropriate to this  
7 case.

#### 8 IV. ANALYSIS

##### 9 A. Whether the Scheduling Order Should be Modified Under 10 Rule 16

11 It is undisputed that Defendant has been unable to meet the  
12 deadline to file a motion to amend its answer under the Court's  
13 Rule 16 Scheduling Order. Defendant filed the instant Motion to  
14 Amend Its Answer on February 3, 2003. The deadline for amendments  
15 to pleadings under the Scheduling Order was December 1, 2002. The  
16 Court must determine whether Defendant has demonstrated good cause  
17 for its failure to comply with the Court's Scheduling Order.

18 As an initial matter, Plaintiff argues that Defendant's motion  
19 to amend its answer should be denied because Defendant does not  
20 explicitly request a change in the Scheduling Order. Plaintiff's  
21 Opposition to Motion to Amend ("Opp'n to Mot.") at 4. Plaintiff  
22 contends that failure to explicitly request a change to the  
23 scheduling order, in a motion that requires such, can result in  
24 dismissal of the motion. Johnson, 975 F.2d at 608-09. Defendant was  
25 granted leave by the Court to file the instant motion to amend on  
26 January 13, 2003. The Court was aware that Defendant's motion for  
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1 leave to file a motion to amend, filed December 23, 2002, may  
2 result in a change in the scheduling order. Similarly, the Court is  
3 aware that Defendant's motion to amend, filed on February 3, 2003,  
4 is outside of the time parameters initially set by the Court.  
5 Defendant's motion is therefore properly viewed as a request for a  
6 change to the Scheduling Order, and the Court will examine it under  
7 Rule 16.

8 As noted above, the good cause inquiry under Rule 16 primarily  
9 considers the diligence of the party seeking the amendment.  
10 Jackson, 18 F.R.D at 607. Prejudice to the Plaintiff is not a  
11 required consideration under Rule 16. Johnson, 975 F.2d at 609. The  
12 Court now considers whether Defendant has demonstrated diligence by  
13 analyzing three aspects of Defendant's diligence: (1) whether  
14 Defendant was diligent in assisting the Court in creating a  
15 workable scheduling order; (2) whether non-compliance with the  
16 scheduling order occurred notwithstanding diligent efforts to  
17 comply, because of the development of matters that could not have  
18 been reasonably foreseen at the time of the scheduling conference;  
19 and (3) whether Defendant was diligent in seeking amendment to the  
20 scheduling order, once it became apparent that it could not comply  
21 with the order. Jackson, 18 F.R.D. at 608.

22 **1. Diligence in Creating a Workable Scheduling Order**

23 The first aspect of Defendant's diligence to consider is  
24 whether Defendant was diligent in assisting the Court in creating  
25 a workable scheduling order. Jackson, 186 F.R.D. at 608. The Court  
26 held a Scheduling Conference by telephone, on October 7, 2002. At  
27

1 this conference, the Court set a deadline of December 1, 2002, for  
2 the parties to request leave to file amended pleadings or add  
3 parties. Scheduling Order at 2. Counsel for both Plaintiff and  
4 Defendant participated in the telephone conference. Plaintiff  
5 alleges nothing that would suggest that Defendant was uncooperative  
6 in assisting the Court in creating a workable scheduling order.  
7 Defendant timely filed for leave to file an amended answer on  
8 December 2, 2002, thereby complying with the scheduling order.  
9 Though this motion was withdrawn, the Court has already concluded  
10 that the mistake precipitating the withdrawal was made in good  
11 faith. Minute Order (1/13/03) at 3. Therefore, it appears that  
12 Defendant made efforts to comply with the deadline to file for  
13 leave to file an amended answer, as set forth in the scheduling  
14 order. Defendant was diligent in helping create and maintain a  
15 workable scheduling order.

16           **2. Unforeseen Matters From the Time of the Scheduling**  
17           **Order**

18           A second inquiry into Defendant's diligence is whether  
19 Defendant's non-compliance with the scheduling order occurred  
20 notwithstanding diligent efforts to comply, because of the  
21 development of matters that could not have been reasonably foreseen  
22 at the time of the scheduling conference. Jackson, 186 F.R.D. at  
23 608. Defendant's failure to file a memorandum of points and  
24 authorities in support of its timely motion to amend was  
25 inadvertent and therefore not reasonably foreseeable from  
26 Defendant's point of view. Plaintiff does not dispute the argument  
27

1 that Defendant could not reasonably foresee its failure to file a  
2 supporting memorandum of points and authorities.

3 Plaintiff argues, however, that Defendant's motion should be  
4 denied because Defendant has not shown diligence in seeking the  
5 information that is the grounds for the requested amendment. Opp'n  
6 to Mot. at 5. This argument is misdirected. Defendant does not seek  
7 a change to the scheduling order to file the requested amendment  
8 based on the acquisition of information which it did not have at  
9 the time of the original deadline. Instead, Defendant seeks a  
10 change to the scheduling order because of Defendant's initial  
11 mistake of not filing a supporting memorandum of points and  
12 authorities. Defendant's first motion to amend its Answer was  
13 timely filed. The Court is persuaded that Defendant has diligently  
14 attempted to comply with the Court's Scheduling Order in spite of  
15 unforeseen circumstances.

16 **3. Diligence in Seeking Amendment of the Scheduling**  
17 **Order**

18 A final factor for the Court to consider in the Rule 16  
19 analysis is whether Defendant was diligent in seeking amendment of  
20 the Court's scheduling order after it became apparent that  
21 compliance with the scheduling order was impossible. Jackson, 186  
22 F.R.D. at 608. Plaintiff argues that Defendant has not been  
23 diligent in seeking amendment of the scheduling order. To support  
24 this, Plaintiff refers to Defendant's filing of a Motion to Amend,  
25 on December 2, 2002, and its failure to accompany this with a  
26 memorandum of points and authorities. Opp'n to Mot. at 6. However,  
27



1 the Court already concluded that Defendant's failure to file the  
2 memorandum of points and authorities was a result of excusable  
3 neglect.

4 Defendant has been diligent in seeking amendment to the  
5 scheduling order. Upon discovering that Defendant's timely motion  
6 to amend its answer and counterclaims was deficient, Defendant  
7 withdrew the motion on December 12, 2002. Following this, Defendant  
8 filed a Motion for Leave to File a Motion to Amend Its Answer on  
9 December 23, 2002. The Court granted this motion on January 13,  
10 2003, and Defendant filed the instant Motion on February 3, 2003.  
11 In seeking to remedy the mistake it made in its initial motion,  
12 Defendant has been diligent in filing subsequent motions. The  
13 instant motion, requesting a change to the scheduling order, was  
14 filed less than three weeks after leave to file the motion was  
15 granted.

16 Based on the foregoing, the Court concludes that Defendant has  
17 demonstrated diligence sufficient for this Court to modify its  
18 Scheduling Order under Rule 16 and allow Defendant to file an  
19 amended answer.

20 **B. Whether the Motion for Leave to Amend Should be Granted**  
21 **Under Rule 15**

22 Defendant seeks to file an amended answer so that it may add  
23 affirmative defenses and counterclaims in order to bring all claims  
24 related to the case at hand. Mot. to Amend at 3. Defendant brings  
25 the instant Motion pursuant to Federal Rule of Civil Procedure 15.  
26 Id. Plaintiff opposes such amendment on the grounds that the  
27

1 additional counterclaims are "without merit" and the late addition  
2 of them will prejudice Plaintiff by forcing it to conduct  
3 additional discovery. Opp'n to Mot. at 7. Under Federal Rule of  
4 Civil Procedure 15, a party may amend its pleading by leave of the  
5 court and "leave shall be freely given when justice so requires."  
6 Fed. R. Civ. P. 15(a). The Court must consider four factors in  
7 determining whether to allow Defendant to amend its complaint: (1)  
8 undue delay; (2) bad faith; (3) futility of amendment; and (4)  
9 prejudice to the opposing party. Foman, 371 U.S. at 182. However,  
10 the Ninth Circuit has held that in determining whether to grant  
11 leave to amend, the "crucial factor is the resulting prejudice to  
12 the opposing party." Howey, 481, F.2d at 1190.

#### 13 1. Undue Delay

14 The first factor for the Court to consider is whether  
15 Defendant unduly delayed seeking leave to amend. The deadline for  
16 requesting leave to amend was December 2, 2002, and it was nearly  
17 two months from this date that Defendant filed the instant motion.  
18 However, Defendant contends that there has been no undue delay in  
19 the process of filing the instant motion. Mot. to Amend at 6.  
20 Defendant initially sought amendment to its answer within the time  
21 allowed by the Court. When it realized that this would not be  
22 possible, owing to the mistake made by Defendant in failing to file  
23 a supportive memorandum, Defendant acted promptly to remedy the  
24 situation. Defendant withdrew the deficient motion, then sought,  
25 and was granted, leave to file a motion to amend its answer and  
26 counterclaims. Defendant then filed the instant motion within a  
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1 reasonable time. The Court has already concluded that Defendant's  
2 prior mistake was a result of excusable neglect, and such mistake  
3 did not constitute undue delay. The Court finds no undue delay in  
4 Defendant's seeking leave to amend.

## 5           2.    Bad Faith or Dilatory Motive

6           A second query for the Court is whether Defendant acted in bad  
7 faith or with dilatory motive in seeking the amendment. Defendant  
8 alleges that it has not brought the instant motion with any  
9 dilatory motive, nor in bad faith. Mot. to Amend at 6. Plaintiff  
10 does not dispute this. Therefore, this factor weighs in favor of  
11 granting Defendant's motion.

## 12           3.    Futility

13           The third factor for the Court to consider is the futility of  
14 the amendments sought. Under Rule 15, if an amendment to a pleading  
15 is futile, the court should not grant leave to amend. Foman, 371  
16 U.S. at 182. Plaintiff argues that Defendants amended claims are  
17 "without merit" and therefore futile. Opp'n to Mot. at 3. However,  
18 Plaintiff offers no facts or arguments to support its contention  
19 that Defendant's claims are meritless. Therefore, Plaintiff has not  
20 argued substantively that Defendant's amended claims are futile.  
21 Additionally, if Defendant has legitimate affirmative defenses and  
22 counterclaims, justice requires that these be given a fair  
23 examination. Therefore, the amendment sought is not futile, and  
24 this factor weighs in favor of granting the motion.

## 25           4.    Prejudice

26           The final consideration of the Court is whether Plaintiff will  
27

1 be prejudiced by the addition of affirmative defenses and  
2 counterclaims. The "crucial factor" under the Foman analysis is the  
3 resulting prejudice to the opposing party. Howey, 481 F.2d at 1190.  
4 Plaintiff alleges that the instant Motion should be denied under  
5 the Rule 15 standard, because Plaintiff will be "prejudiced by  
6 having to conduct discovery to defend against these last-minute  
7 counterclaims." Opp'n to Mot. at 7. However, Plaintiff's claim that  
8 it will encounter prejudice as a result of having to conduct  
9 additional discovery is unsubstantiated. Discovery is to be  
10 anticipated with litigation, and a claim that having to conduct  
11 additional discovery will be prejudicial, without more, is not  
12 determinative. The discovery cut-off in this case is April 15,  
13 2003. As of the date Defendant filed the instant motion, Plaintiff  
14 had not served Defendant with any discovery. Mot. to Amend at 5.  
15 Furthermore, Defendant states that the additional counterclaims  
16 arise out of the "same set of operative facts that are alleged in  
17 the Complaint". Id. Plaintiff does not refute this assertion, nor  
18 does Plaintiff allege any other ways in which it will be prejudiced  
19 by the Court's allowing Defendant to file an amended Answer.  
20 Therefore, this factor weighs in favor of granting Defendant's  
21 motion.

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1 Based on the foregoing, all four of the Foman factors weigh in  
2 favor of granting Defendant's motion to amend under Rule 15.

3 V. CONCLUSION

4 For the foregoing reasons, Defendant's Motion to Amend Its  
5 Answer is GRANTED.

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7  
8 IT IS SO ORDERED.

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10 Dated: March 10, 2003

11   
12 LOURDES G. BAIRD  
13 United States District Judge  
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